IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1972
No. 72-1333

FILED
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MICHAEL RODAK, JR., CLERK

LESTER ARTHUR CORSON
and ALFRED SUSKIN,

Petitioners,

v.

SUPERIOR COURT OF THE COUNTY
OF LOS ANGELES,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Petition for Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District

BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION

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BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION

STATEMENT OF THE CASE

There is now pending in the Superior Court of the State of California for the County of Los Angeles a criminal prosecution, case number A-064,383, in which petitioners are charged with conspiracies relating to obscenity. (See Petition, p. 3.) On February 15, 1972, the pretrial motion of each petitioner to set aside the information pursuant to California Penal Code section 995 was denied

by the trial court.[1] On October 17, 1972, the pretrial motion of each petitioner made under California Penal Code section 1538.5 was denied by the trial court.[2] A petition for writ of mandate and prohibition and/or other appropriate writ was denied without opinion on December 7, 1972 by the Court of Appeal of the State of California, Second Appellate District. (See Petition, p. 2 and Exhibit "A" thereto.) A petition for hearing was denied without opinion by the California Supreme Court on January 5, 1973. (See Petition, p. 2 and Exhibit "B" thereto.) On April 2, 1973, a petition for writ of certiorari was filed in this Court ". . . to review and reverse an order and judgment denying a petition for writ of mandate and prohibition and/or any other appropriate writ, on the ground that their arrest was illegal and that the search and seizure of their automobile and the seizure of films were in violation of the Fourth and Fifth Amendments to the Constitution of the United States." (See Petition p. 1.) This Court has directed that a response be filed in this case on or before June 20, 1973.[3]

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1. California Penal Code sections 995 and 999a are set forth in the Appendix.

2. California Penal Code section 1538.5 is set forth in the appendix.

3. Although the Clerk of this Court requested the Attorney General of the State of California to file a response, it is the District Attorney of the County of Los Angeles who is the attorney of record for the real party in interest. For that reason, the latter will file this response.

THIS COURT LACKS JURISDICTION
TO HEAR THIS MATTER

Both California Penal Code sections 995 and 1538.5 pertain to pretrial proceedings in a criminal case. Neither the denial without opinion of a petition for a writ of prohibition/mandate by the Court of Appeal of the State of California, Second Appellate District, nor the denial without opinion of a hearing by the California Supreme Court constituted a conclusive decision on the merits. Indeed, "It is settled law than an appellate court's action denying without opinion a petition for a writ of mandate or prohibition is not the determination of a 'cause' requiring oral argument and a written opinion." (People v. Medina, 6 Cal.3d 484, 490, 492 P.2d 686, 689.) Furthermore, "The denial without opinion of a petition for a writ of mandate or prohibition is not res judicata except when the sole possible ground of denial was on the merits or it affirmatively appears that the denial was intended to be on the merits." (Id., 6 Cal.3d at 491 (footnote 6); 492 P.2d at 690.)

Manifestly, Petitioners have erroneously invoked the jurisdiction of this Court under 28 U.S.C. Section 1257(3) because there has been no "[f]inal judgment or decree rendered by the highest court of a State in which a

decision could be had, . . ." (See Whitus v. Georgia, 385 U.S. 545, 546-547, 17 L.Ed.2d 599, 602, 87 S.Ct. 643; Chapman v. California, 405 U.S. 1020, 33 L.Ed.2d 483, 92 S.Ct. 1284.)[4]

Finally, even if it should be deemed that the denial of the petition for writ of prohibition mandate by the Court of Appeal of the State of California, Second Appellate District, constituted a final judgment or decree within the meaning of 28 U.S.C. Section 1257(3), we respectfully urge that the instant case, which involves a pending criminal prosecution set for trial, is not appropriate for a present review on writ of certiorari, Rule 19, Rules of the Supreme Court of the United States. See Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 699, 91 S.Ct. 746; Samuels v. Mackell, 401 U.S. 66, 27 L.Ed.

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4. Because this Court in Chapman denied the petition for a writ of certiorari, "[i]t appearing that the state court decision is not final," although a written opinion was rendered by a California appellate court respecting pretrial litigation of search and seizure issues in an obscenity case, there is all the more reason to conclude that the petition for a writ of certiorari should be denied in the instant case where the appellate courts did not render written opinions. It should be noted that Chapman, as does the instant case, does not involve a situation where denial of review would effectively foreclose this Court's later consideration of a federal claim. (Compare, California v. Stewart, 383 U.S. 436, 498 (footnote 71), 16 L.Ed.2d 694, 86 S.Ct. 1602.)

2d 688, 91 S.Ct. 764; Boyle v. Landry, 401 U.A. 77, 27 L.Ed.2d 696, 91 S.Ct. 758; Perez v. Ledesma, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674; Dyson v. Stein, 401 U.S. 200, 27 L.Ed.2d 781, 91 S.Ct. 769; Byrne v. Karalexis, 401 U.S. 216, 27 L.Ed.2d 792, 91 S.Ct. 777.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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§ 995. Cases in which indictment or information must be set aside

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases;

If it be an indictment:

1. Where it is not found, endorsed and resented as prescribed inthis code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been commited without reasonable or probable cause.

(Enacted 1872. Amended by Code Am.1880, c. 118, p. 43, § 1; Stats. 1911, c. 256, p. 435, § 1; Stats. 1927, c. 854, p. 1756, § 1; Stats.1939, c. 457, p. 1806, § 1; Stats. 1949, c. 1311, p. 2298, § 1.)

§ 999a. Writ of prohibition; time for filing petition; grounds; service; time for issuance of alternative writ

A petition for a writ of prohibition, predicated upon the ground that the indictment was found without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, must be filed in the appellate court within 15 days after a motion made under Section 995 of this code to set aside the indictment on the ground that the defendant has been indicted without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, has been denied by the trial court. A copy of such petition shall be served upon the district attorney of the county in which the indictment is returned or

the information is filed. The alternative writ shall not issue until five days after the service of notice upon the district attorney and until he has had an opportunity to appear before the appellate court and to indicate to the court the particulars in which the evidence is sufficient to sustain the indictment or commitment.

(Added by Stats.1949, c. 1311, p. 2299, § 2. Amended by Stats.1953, c. 614, p. 1861, § 1.)

§ 1538.5 Motion to return property or suppress evidence

(a) Grounds. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) First hearing. When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Evidence. Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) Effect of granting motion. If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the People.

(e) Return of property. If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) Felony; motion at preliminary hearing. If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) Misdemeanor; pre-trial motion at special hearing. If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) Motion at trial. If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) Felony; renewal of motion at special hearing review. If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) Relitigation of question after grant of motion; new evidence, review. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the

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the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is grante at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) Release of defendant pending resumption of proceedings in trial court. If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a

petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged fron actual custody upon bail.

(l) Stay; time for trial; dismissal; continuance; bail or release. If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4

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(m) Exclusive pre-trial remedy; review on appea after conviction. The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedie prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Motions on other grounds;existing law and procedure. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) People's petition for mandate or prohibitio notice of intention. Within 30 days after a defendants motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for

a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

(Added by Stats.1967, c. 1537, p.3652, § 1. Amended by Stats.1970, c. 1289, p. 2380, § 2; Stats,1970, c. 1441, p. 2800, § 1.5.)